EXHIBIT 9

BEFORE AN INTEREST ARBITRATION BOARD

Between

Union Pacific Railroad Company

And Its Employees
Represented By
International Association of Sheet Metal, Air, Rail and Transportation Workers – Transportation Division

National Mediation Board Case No. 1208

CARRIER'S REPLY SUBMISSION

January 13, 2025

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INTRODUCTION

In both collective bargaining and interest arbitration, there is an old and well-known strategy of initially asking for something that is well beyond the realm of realistic expectations. By leading with a huge ask, a party can benefit from "anchor bias," which is the tendency to credit an initial reference point, even if it has no basis in reality. If the starting point is stratospheric, then even if the end result is far below the median, it will often still exceed the party's goals.

SMART-TD's proposed agreement in this proceeding is a quintessential example of that strategy in action. In the union's Appendix B, it lays out a long wish list of various demands that would cost Union Pacific hundreds of millions of dollars per year, including overtime pay, differentials, paid personal leave, elimination of entry rates, more paid vacation, expanded bereavement leave, and many more, plus various seemingly minor – but in fact significant – changes to other rules and practices. Union Submission ("Union Sub.") at 85-110. In total, the size of these various demands goes well beyond the extravagant requests that the union made in bargaining, including its initial December 28, 2023 proposal and its final June 14, 2024 proposal.

Moreover, all of those demands come on top of the union's proposal for "voluntary assigned days off," which, as SMART-TD acknowledges, would – just by itself – cost Union Pacific tens of millions of dollars per year. Union Ex. 43. The union does not even bother to cost any of its other demands. Instead, it asserts that Article VII will save the railroad the princely sum of $333,587,000 per year, and therefore justifies any new benefit that the union can dream up.

SMART-TD's position is not credible, to put it mildly. As discussed in Union Pacific's Opening Submission – and as the union itself admits in its own submission – Articles V, VI, and VII limit this Board's jurisdiction to resolving questions of implementation of a narrow set of scheduling, bidding, and assignment rules. *See* Carrier Sub. at 40-44; Union Sub. at 37. The vast, vast majority of SMART-TD's proposals are not even properly before this Board, and should be rejected at the very outset, before turning to the actual merits question of "whether and how" to implement Articles V, VI, and VII.

Nor does the union offer anything close to a "fair and equitable" agreement. Its claims that Union Pacific will save "$333,587,000 annually" and/or will eliminate 80 percent of the extra boards are simply wrong, the product of a costing methodology that is riddled with errors and a misinterpretation of what the carrier said during bargaining. *See infra* at 29-37. A realistic estimate of the railroad's potential savings – as outlined in Union Pacific's Opening Submission – is just over $15 million per year, all in, for everything, including both Article VI and VII. Carrier Sub. at 52-54. Those savings are outweighed by any conceivable implementation of "assigned days off" under Article V. The carrier's proposal (5/1 plus Smart Rest) will cost over $18 million per year, whereas the union's proposed schedule (6/3 for pools plus 5/2 for extra boards) would cost at least $80 million per year. Adding the cost of any of the other union demands on top of that would produce an even more unbalanced, inequitable result. A complete analysis of the flaws in SMART-TD's costing is attached hereto as Exhibit 42.

The other fundamental problem with SMART-TD's proposal is that it does not align with the purposes and goals of the 2022 National Agreement. Rather than trying to achieve the sort of "win-win" recommended by PEB 250 – combining better schedules for employees with "operational benefits and cost savings" for the carrier – the union's proposal seeks to achieve very different objectives. In particular:

(1) The union's proposal would expand pay for time not worked, including time that employees are on leave or available but not working. One of the goals of Articles VI and VII is to limit pay for time not worked, not expand it.

(2) The union wants to give employees discretion about whether and when they work, including the ability to use various leave options to avoid work on weekends and holidays. Few if any other American industries allow employees to decide if and when they want to work (and pay them if they choose to stay home).

(3) SMART-TD fixates on what it calls a "proper home cycle time," by which it means the amount of time between work trips. But Article V is about scheduling "days off," not the number of hours in-between shifts.

(4) The union also dwells on what it says are continued problems with hiring and retention. Those issues were debated before PEB 250, but are not the question here. There is no current problem with hiring and retention, and even if there were, that is not the purpose of Articles V, VI, and VII.

(5) SMART-TD continues to ignore the impact of its proposals on railroad operations. It has little or no regard, it seems, for efficiency, ease of administration, or customer service.

This Board now has the unenviable task of trying to sort through all of these issues and settle on rules that are equitable, workable, and tailored to the implementation of Articles V, VI, and VII. To achieve that, Union Pacific suggests that this Board address the following specific questions:

1. **Scope:** What rules can be proposed under each Article? Are the union's proposals limited to implementing "assigned days off for thru-freight service" under Article V? Are the carrier's proposals limited to implementing the rules identified in Articles VI and VII?

2. **Cost:** When implementing Articles V, VI, and VII, what is a fair and equitable trade? Does each side's proposal generate the sort of cost-neutral "win-win" envisioned by PEB 250? In determining what is equitable, what is the proper way to calculate how much each proposal will actually cost?

3. **Workability:** How would the parties' respective proposals function in practice? Will Union Pacific "obtain a more efficient and reliable system for manning the locomotives, with both operational benefits and cost savings," as the PEB recommended? Will employees "obtain preferred schedules with more control over their personal lives when not otherwise scheduled"?

The answers to those questions lead inexorably to the conclusion that Union Pacific's proposed agreement should be adopted, and SMART-TD's competing proposed agreement should be rejected.

ARGUMENT

The union's Opening Submission fails to offer any legitimate reason to adopt the union's proposal or to reject the carrier's proposal for the implementation of Articles V, VI, and VII. In Part I below, we show that the union's demands – nominally asserted under Article V – go far beyond what that Article provides and are otherwise unjustified. In Part II, we address SMART-TD's proposals under Articles VI and VII, demonstrating that those proposals are also unwarranted. In Part III, we explain that the union's costing methodology is badly flawed, both in terms of how it measures the costs of Article V and how it calculates the benefits of Articles VII. In Part IV, we respond to SMART-TD's attacks on what it predicted would be (but is not in fact) the carrier's proposal. Finally, in Parts V, VI, and VII, we supplement our existing arguments with respect to the union's secondary points about other carrier agreements, the conduct of bargaining, and the IGN and T&P properties.

I. THE UNION'S PROPOSED TERMS FOR ARTICLE V SHOULD BE REJECTED.

A. The Parties Agree That the Board Has Limited Jurisdiction.

In Union Pacific's Opening Submission, we explained that the Board's jurisdiction in this proceeding is restricted to the question of "whether and how" to implement the specific rules listed in Articles V, VI, and VII. Carrier Sub. at 37-44. The language of the National Agreement, the bargaining history and arbitral precedent all support the conclusion that the Board should not and indeed may not address demands – from either side – on other subjects. *Id.*

In its own Opening Submission, SMART-TD acknowledges that this arbitration cannot be used to impose terms outside the scope of what is permitted by the National Agreement. It states, for example, that "[a]ny Agreement provisions Carrier desires to modify in addition to those listed in Article VI ***cannot be imposed by a tribunal but must be mutually agreed upon*** as they were not included in PEB 250 or Public Law 117-216. Union Sub. at 35-36 (emphasis added). While SMART-TD was speaking of Article VI, the same would, of course, hold true for "any Agreement provisions [SMART-TD] desires to modify in addition to those listed in [any Article]." There is certainly no basis to distinguish between the three Articles in this respect – none of them provide any authority to impose extraneous terms.

SMART-TD also observes that this Board's limited jurisdiction is not expanded or altered by the fact that the parties voluntarily chose to discuss other subjects in their pre-arbitration bargaining. The union states:

> "While a voluntary agreement grants the parties broad latitude to include provisions not contained in Articles V – VII through mutual agreement, there are still certain provisions we cannot disregard or omit, such as Article VII(c), above. Binding arbitration is considerably different than a voluntary agreement, as ***the Neutral must be cognizant of the guardrails contained within the Public Law and ensure provisions for each Article [are] limited to those that are necessary for the successful implementation of each Article*** and will provide an equitable quid pro quo between the parties."

Union Sub. at 37 (emphasis added). Again, we agree. Both sides were willing to offer terms as part of a voluntary agreement that are no longer available now that the parties have gone down the road of arbitration. The terms of any award must be cabined by the constraints of Articles V, VI, and VII.

B. Almost All of the Union's "Article V" Proposals Exceed What Can Be Imposed Under the National Agreement.

While the parties agree that the Board cannot impose terms that go beyond what is authorized by Articles V, VI, and VII, they vehemently disagree about the scope of those Articles. SMART-TD seems to believe that Article V permits new agreement terms on a wide range of topics, including not only "scheduled days off," but also various "additional" forms of paid and unpaid leave, extra compensation, hiring incentives, and much more. *See* Union Sub. at 16-34 (describing the union's various proposed terms for Article V).

That is not so. The ***only*** terms that SMART-TD may propose – or that this Board may impose – are "rules creating voluntary assigned days off in thru freight road service."[1] *See* Carrier Sub. at 37-44. "Voluntary assigned days off" refers to particular days when employees are not obligated to answer a call to come to work, *i.e.*, like a clerk who does not work on Mondays or a pharmacist who does not work on Wednesdays. As reflected in the Report of PEB 250, the submissions of the parties to that Board, and the related bargaining, everyone understood that this was a ***scheduling*** issue, *i.e.*, how to ensure that employees with irregular schedules could have some certainty about when they will have time off.[2] It is not about pay, expenses, staffing levels, hiring practices, benefits, or "additional" forms of leave.

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1 Ex. 1 (2022 National Agreement) at 8.

2 Ex. 4 (PEB 250 Report) at 35-36 (describing process for resolving union requests regarding "scheduling"); Ex. 32 (Carriers' Work Rules Submission to PEB 250) at 13-14; Ex. 30 (SMART-TD Submission to PEB 250) at 32; *see also* Ex. 33 (Declaration of Brendan M. Branon) (explaining that *quid pro quo* was scheduling unpaid rest days for the efficiencies of Articles VI and VII).

While that should be obvious, the vast majority of specific terms in the union's Article V proposal are not "rules creating voluntary assigned days off in thru freight road service." Rather than limiting its ask to a schedule for work/rest, the union has thrown in virtually every item on its long-standing wish list, including multiple items that it sought but was unable to obtain in the last round of bargaining.[3] More specifically, all of the following demands are outside the bounds of this proceeding:

1. Article V Does Not Provide Rest Days for Assigned Service.

In the carrier's Opening Submission, we explained the distinction between "yard and local service" – jobs that work set schedules and do not require long-distance travel – and "thru-freight road service" – the jobs that operate trains between terminals. *See* Carrier Sub. at 9-11. Article V is crystal clear that it concerns "assigned days off" ***only*** for "thru-freight road service." That is because it is the employees in thru-freight road service who have variable, unpredictable schedules. Yard and local jobs are "assigned service," meaning that they have set schedules – employees in those jobs typically know when and how much they need to work.[4]

Nevertheless, SMART-TD's proposal includes "voluntary assigned days off" for ***all*** jobs, both yard and road, assigned and unassigned. Union Sub. at 85-90. That is contrary to the plain language of Article V. It is a blatant over-reach, illustrating how SMART-TD is trying to use this process to grasp for benefits that it did not obtain before PEB 250 or in the 2022 National Agreement.

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[3] Ex. 43 (SMART-TD Section 6 Notice to Union Pacific (Nov. 19, 2019)).

[4] Ex. 30 (SMART-TD Submission to PEB 250) at 35.

2. *Article V Does Not Provide Pay for "Days Off."*

As both sides note, the parties' existing agreements provide for payment of a "guarantee" to employees on extra boards (and supplemental boards). *See* Carrier Sub. at 9; Union Sub. at 31. The guarantee rules establish a particular rate, which varies by agreement but is currently around $5,700 for two weeks (a "half"). Extra board employees will receive that amount regardless of how little they work, so long as they remain available for duty. Moreover, an employee who is called for work can outearn the guarantee – they are paid their wages or the guarantee for the half, whichever is higher.

Because the *quid pro quo* for payment of the guarantee is availability, if an extra board employee marks off or is otherwise unavailable, their guarantee is reduced for each day they are not available. If the employee exceeds a maximum number of unavailable hours or days permitted by agreement during the guarantee period, they lose or forfeit the entire guarantee for that "half."

The union's Article V proposal seeks to undo the fundamental bargain of the guarantee agreements, forcing the railroad to pay the guarantee even when employees are ***not*** available. *See* Union Sub. at 21, 31, 88-90. SMART-TD tries to obscure this by asserting that it wants to prevent employees from being "penalized for voluntarily observing rest days," *id.* at 21, or by describing its proposal in terms of "compression" of the guarantee from 15 days to 11 days. *Id.* at 89. But make no mistake – this is an effort to require pay for employees when they are not working (or even available to work). It is the functional equivalent of a large pay increase, boosting extra board compensation by more than $30 million per year. *See* Carrier Ex. 42.

Moreover, as noted in the carrier's Opening Submission, SMART-TD's proposal seeks to undo decades of its losses in arbitration on this point. *See* Carrier Sub. at 62. Arbitrators have repeatedly upheld the principle that employees are paid the guarantee in exchange for availability, and so if they are unavailable for any reason, they are not owed the guarantee.[5] An employee who is taking a voluntary assigned rest day is not available, and so should not be entitled to a guarantee. There is nothing unfair about that. To the contrary, it would be unfair to change the existing rules to require Union Pacific to pay employees to take days off.

That is why another interest arbitration panel recently rejected SMART-TD's proposal to expand guarantee pay under the same Articles. In *SMART-TD v. Canadian Pacific Kansas City Railway*, the union "request[ed] that any guarantees not be offset if an employees is observing scheduled off days."[6] In other words, just as in this case, SMART-TD wanted employees to receive the maximum guarantee even if they took assigned days off. The Board rejected that proposal, imposing terms providing that "conductors assigned to a guaranteed extra board that exercise their voluntary day off option will not qualify for guarantee pay when rest days are observed and on any day when returning from rest, if returning any time after 0001."[7] The same rule should apply here – nothing in Article V (or VI or VII) provides any basis for changing existing rules tying the payment of guarantees to availability.

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5 *See id.* at note 67 (collecting cases).

6 Ex. 44 (*SMART-TD v. Canadian Pacific Kansas City Railway*, (Dec. 23, 2024) (Phillips, Arb.) at 2 (emphasis added)). This is a new award that parallels the other CPKC awards previously cited. *See* Ex. 3 and Ex. 31.

7 *Id*. at 5.

3. *Article V Does Not Provide for "Additional Rest Opportunities."*

SMART-TD asserts that the Board should award "additional opportunities for employees to obtain rest" under Article V, over and above the "voluntary assigned days off" it provides. Union Sub. at 25-26. In particular, the union asks for "earned days off" ("EDO") and the right to "trade turns." *Id.*

It is not entirely clear which National Agreement provision the union means to invoke as the basis for these proposals. The only Article under which the union can initiate its own proposal is Article V, but that is clearly inapplicable. As the union admits, these other forms of leave are "additional" to Article V (*id.* at 25); they are by definition something other than a "voluntary assigned day off," and thus not obtainable under Article V.

Hence, the union probably means to invoke Article VII. There is, however, no basis for an "EDO" rule under Article VII.[8] The union points to Article VII(c)(1)(a), which provides that "[i]n conjunction with adoption of [self-supporting pools and/or pool regulation], new agreements will provide for one or more of the following . . . [o]pportunity for employees to observe rest outside the requirements of the Rail Safety Improvement Act . . . ."[9] In other words, the union seems to be saying it can propose both days off under Article V and then also even more options for days off under Article VII(c).

[8] There is no real debate about trading assignments – Union Pacific's Article VII proposal already includes such a rule (along with a proposed rule expanding the options for pre-arranged layoffs). *See* Carrier Sub. at 34 & Ex. 7.

[9] Ex. 1 (2022 National Agreement) at 12.

Any such claim by SMART-TD rests on a misinterpretation of Article VII(c). The intent of that language – providing that if the parties adopt a new agreement on self-supporting pools and pool regulation it must also include rest opportunities – was simply to tie together the different pieces of the scheduling and assignment rules. Keep in mind that this arbitration is about "whether and how" to implement each Article.[10] This Board could, under that standard, decline to implement one or more of the Articles altogether. But Article VII(c) makes clear that if the Board implements the other provisions of Article VII, *i.e.*, self-supporting pools and pool regulation, it should also include rest opportunities for employees, *i.e.*, some form of assigned days off.[11]

Because Union Pacific's proposal includes assigned days off (plus Smart Rest) – along with trade turns and pre-arranged lay-off rules – it satisfies each and every component of Article VII(c). SMART-TD's proposal for EDOs, by contrast, would double up on its demand for days off. That sort of duplication is unwarranted, especially when the data show that employees already have reasonable work/life balance. *See* Carrier Sub. at 59. Nor is there any indication, contrary to the union's assertions, that PEB 250 (or the parties) believed that it would be necessary to provide multiple, overlapping options for rest days.

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[10] *Id.*

[11] On a related note, the language of Article VII(c) – along with the bargaining history that led to that language – clearly shows that the entire *quid pro quo* was rest days in exchange for self-supporting pools and pool regulation. *See* Ex. 45 (Draft Proposals) (Sept. 2022). The carriers had originally proposed handling all three issues – rest days, bid procedures, and self-supporting pools/pool regulation – in a single Article. The unions' lead negotiator insisted that rest days had to be in its own separate article, but noted that splitting out the subjects "doesn't change application" of the Agreement. *Id.*

Moreover, and in any event, SMART-TD is not entitled to propose its own preferred form of rest opportunities under Article VII. As one of the CPKC awards concludes, the union's "response is limited to issues concerning the implementation of the Carrier specified matters noticed, precluding the negotiation of additional issues without clear consent and waiver by both parties."[12] Thus, SMART-TD can make proposals about how to implement the carrier's proposed rules, but it cannot offer its own separate rules that are not included in Union Pacific's Article VII proposal.

4. Article V Does Not Provide for Additional "Pay Elements."

Perhaps the most glaring examples of excess in the union's proposal are its suggested terms for new "pay elements." Union Sub. at 26-27. SMART-TD argues that employees should be entitled to increases in "held away pay," increases in "away from home meal allowances," overtime pay, and differential pay. *Id.*

The union's stated rationale – that these massive pay increases (worth well over $140 million per year) are necessary to ensure "proper cycle times" – has no basis whatsoever. *Id.* The Hours of Service Act already provides for guaranteed periods of time between shifts, and so defines the "cycle time" for operating craft employees. *See* Carrier Sub. at 11. The notion that there is some other undefined "proper" amount of time for employees to spend at home between shifts has been invented from whole cloth. It has no grounding in any objective evidence, was not discussed in bargaining over the National Agreement, and was never mentioned by PEB 250.

[12] Ex. 3 (CPKC Award) (Oct. 14, 2024) at 11.

Perhaps more importantly, Article V says nothing about work/rest "cycle times." It is one thing to provide that employees in unscheduled service should have assigned days off; it is something else entirely to say that employees are entitled to define how long they stay at home in-between shifts.

Moreover, the union is not proposing daily rest or any other "cycle times," but rather just more money, including for categories of pay that have nothing to do with work/rest "cycles." There is simply no rational connection between, for example, weekend differentials and Article V.

In addition, the union's own collective bargaining proposals undercut its position that extra "pay elements" are obtainable here. In 2019, SMART-TD's Section 6 notices to Union Pacific included proposals for many of the same "pay elements" it now seeks (along with other items on its wish list, such as expanded vacation, bereavement leave, and the like).[13] Those proposals were distinct from the union's proposal for rest days – the proposal that led to Article V – showing that the union understood that matters such as overtime pay, entry rates, and weekend differentials are not part of rest days.[14] And now, in the new bargaining round that opened on November 1, 2024, SMART-TD has again sought many of the same changes (*i.e.* elimination of entry rates, overtime pay, weekend differentials, etc.), once again confirming that those subjects are matters for separate negotiations, not this process.[15]

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[13] Ex. 46 (2019 Section 6 Notices from SMART-TD to Union Pacific).

[14] *Id.*

[15] Ex. 47 (2024 Section 6 Notices from SMART-TD to Union Pacific).

5. *Article V Does Not Provide for Extra Board Staffing and Pay Rules.*

The union also asks for two "additional important items" for extra board employees. Union Sub. at 27-31. First, SMART-TD seeks new rules requiring "minimum staffing levels" for extra boards, claiming that current staffing levels are, in the union's opinion, "inadequate." *Id.* at 28. Second, SMART-TD asks the Board to impose new rules requiring that extra board employees be paid when they are unavailable due to the requirements of the Hours of Service Act. *Id.* at 31.

Neither of these items is a rule implementing "voluntary assigned rest days." As the union admits, the debate over minimum staffing levels is a completely separate "long-standing" dispute. *Id.* at 28. The union wants more employees on the extra boards in order to increase the size of its membership (and hence its dues revenue). The carrier is adamantly opposed, in part because increasing the size of the extra boards means that Union Pacific would pay for more employees to be available but not working. The whole point of Article VII is to ***reduce*** reliance on the extra boards by moving to self-supporting pools, thereby allowing Union Pacific to "abolish" extra boards when and where it deems appropriate.[16] SMART-TD's proposal would force Union Pacific to ***increase*** the extra boards, undercutting the primary cost-savings rule that the railroad achieved in the 2022 National Agreement. Nor are minimum staffing levels necessary for "predictable cycle times," which, again, is not a concept that is contemplated by Article V (or any other provision of the National Agreement).

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16 Ex. 1 (2022 National Agreement) at 12.

In any event, the matter is not open to debate in this proceeding. Article VII(b)(6) of the 2022 National Agreement expressly gives Union Pacific sole authority to "regulate[]" all extra boards "based on the needs of service."[17] That means that the railroad has the right to decide how big or small the extra boards need to be in order to provide efficient and timely service to customers.

Likewise, SMART-TD's demand for more pay for extra board employees is also groundless. As noted above, the union is arguing that employees who take voluntary assigned rest days should be paid, contrary to the long-standing interpretation of guarantee rules in dozens of arbitration awards on Union Pacific and other railroads. *See supra* at 10 and Carrier Sub. at 62. Not content with that over-reach, SMART-TD is also asking for pay on ***mandatory*** rest days (when an employee hits the limits imposed by the federal Hours of Service Act). Aside from the fact that this would also run counter to the reasoning of that same body of arbitral awards,[18] there is, once again, no conceivable connection between "voluntary assigned rest days" under Article V and rules respecting the payment of guarantees when employees are obligated to rest under federal law. The parties can and should establish rules for assigned days off without altering any existing contract rules or practices regarding guarantees.

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[17] *Id.* In discussing this aspect of its proposal, SMART-TD asserts that Union Pacific will "reduce guaranteed extra boards by 80 percent." Union Sub. at 29. As discussed in Section III below, that is completely false. *See infra* at 33.

[18] *See, e.g.*, Ex. 41 at 141 (*SMART-TD v. CSXT*, PLB 7700, Award No. 3 (2017) (Zusman, Arb.)) ("The [Hours of Service Act] affects the Carrier's rights to operate its employees as it wishes, but it equally restricts the employees in their prior guarantees and benefits. In this instance, the Carrier's determination that the Claimant working six days and required under RSIA to take more than his rest day, but an additional to comply with 48 hours rest was a loss of the employee to the Carrier and a loss of compensation to the employee. The Claimant was unavailable within the meaning of the Rule.").

6. *Article V Does Not Provide for "New Hire Retention."*

By the time it reaches "New Hire Retention," SMART-TD abandons even the pretense of asserting a connection to Article V, and just throws in every extra item it has sought in bargaining with Union Pacific in recent memory. On the premise that this proceeding can be used to address essentially anything, the union returns to its notion that Union Pacific is having trouble hiring employees, proposing a laundry list of new payments and benefits that will, in its view, solve this non-existent problem, including differential pay, more paid personal leave, more paid vacation, changes in the procedures for using paid time off, bereavement leave, and elimination of rate progression (entry rates). Union Sub. at 31-34.

Needless to say, none of that is remotely encompassed by Article V (or anything else in the National Agreement). Like everything else discussed above, none of the union's proposals are "rules creating voluntary assigned days off in thru freight road service," and so this Board lacks jurisdiction to even consider these proposals.[19]

In any event, while SMART-TD seems intent on re-arguing its case to PEB 250, there is currently no "hiring issue" at Union Pacific. The job market has recovered since the pandemic, and Union Pacific is receiving more than 20 applications per available position. Indeed, Union Pacific has exceeded its hiring targets for trainpersons in each of the last several years. Nor is there any evidence of an ongoing retention problem.

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[19] Ex. 1 (2022 National Agreement) at 8; *see also* Ex. 2 (Sept. 16, 2024 Arbitration Agreement) at 1 (providing that this "Board shall have jurisdiction only over changes necessary to implement the rules referenced in Articles V, VI and VII of the National Agreement.").

7. *The Union's Proposed Agreement Terms Include Multiple Other Elements That Are Unrelated to "Voluntary Assigned Days Off."*

While the union's Opening Submission purports to discuss each element of its proposal, it does not tell the whole story. Appendix B to the union's submission provides the detailed language that SMART-TD is asking this Board to adopt. Buried in that Appendix are various terms never even mentioned in the union's submission. In addition to all of the items addressed above, the union has, for example, included provisions preserving guarantee payments for employees who mark off for compensated leave or other reasons, advancing or deferring vacations, payments for deferred lodging, increases in certification allowances, and dozens of other changes. Union Sub. at 85-110.

Again, none of those changes are rules for "voluntary assigned rest days" under Article V or a response to "the implementation of the Carrier-specified matters noticed" under the other Articles.[20] Thus, none of that is within this Board's jurisdiction to award, and all of those terms must be rejected.

* * * *

To be abundantly clear, Union Pacific is vehemently opposed to every single item proposed by SMART-TD that does not fit within the scope of Article V. The carrier paid dearly in wage increases for the right to implement the work rule changes in Article VI and VII. It is also obliged to provide equivalent value in the form of assigned rest days. Nothing else is or should be required.

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[20] Ex. 3 (CPKC Award) (Oct. 14, 2024) at 11.

C. Even the Portions of the Union's Proposal That Are Encompassed Within Article V Are Unwarranted and Unworkable.

While the vast majority of SMART-TD's demands have nothing whatsoever to do with voluntary assigned rest days, the union does, to be sure, propose various schedules for work/rest, including 6/3, 6/2, 5/2, 4/2, 4/1, and other options for pool service, plus a 5/2 schedule for all extra boards. *See* Union Sub. at 85-89. The union's proposed agreement would give it total discretion to select which work/rest schedule it wants for pool service, including the right to change the schedule on 30 days' notice. *Id.* at 85. While it is not entirely clear, the union's proposal also appears to provide for a "preferred/primary work/rest schedule" of 4/1 or 5/1. *Id.* at 86.

Those schedules would undermine Union Pacific's ability to operate, a fact that the union tries to downplay. SMART-TD seems to presume that a 6/3 schedule, for example, would decrease availability by 25 percent. Union Ex. 43 at 6-7. In fact, it would decrease availability by 33 percent (3 unavailable days out of 9 = 1/3). *See also infra* at 32. The union says nothing about how that reduced availability would affect Union Pacific's operations. Nor does the union acknowledge how its approach will affect manpower planning. It blithely asserts that if an employee does not wish to take a rest day, they would not take it, "thus remaining available to provide service." Union Sub. at 20. The union ignores the fact that, without knowing how many employees will be available, the carrier must plan for the worst case, resulting in furloughs and/or excessive guarantee payments to employees whenever they are not needed to run the trains (and then scrambling to hire more employees if that changes).

Rather than offering any solution for those problems, SMART-TD focuses exclusively on employee "work/life balance." Union Sub. at 15, *see also id.* at 18, 25, 49-50. The union argues at length that employees "are subject to call 24/7 and spend many nights away from home." *Id.* at 15. Its approach to work/rest is necessary, the union says, to give employees a "normal work/life balance" while, of course, also "maintain[ing] their earnings potential." *Id.* at 18.

The union's arguments in this regard perpetuate the fiction that underlies SMART-TD's entire case: that thru-freight employees are overworked and exhausted from unreasonable demands, unable to handle their personal and family obligations. That is emphatically not true. As explained in Union Pacific's opening submission, employees in thru-freight service are on duty – *i.e.,* actually working – less than 30 hours a week and less than 1500 hours a year. Both figures are well below the national averages for American workers.[21] This is not to say that thru-freight is undemanding work – it has variable hours and requires regular travel and time away from home. But trainpersons receive copious time off, even before adding assigned days off.

Given that, it is not credible to suggest that trainpersons are in dire need of more rest or "work/life balance," especially when SMART-TD insists that no one's pay should go down. Indeed, the union's proposals reflect a desire not for improved rest, but for employee control over whether to work or not, plus more pay for not working. Those are not the goals of Article V or a proper approach to an award in this case.

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[21] Ex. 48 (U.S. Bureau of Labor Statistics Comparative Hours Data).

II. THE UNION'S PROPOSALS FOR ARTICLES VI AND VII SHOULD BE REJECTED.

Whereas the rest days authorized by Article V are intended primarily to benefit employees, the changes authorized by Articles VI and VII – bidding procedures, self-supporting pools, and pool regulation – are intended primarily to benefit carriers. However, SMART-TD's proposals under Article VI and VII would deprive Union Pacific of the benefit of that bargain, and instead would use those provisions to obtain millions more in additional compensation with no regard for efficiency. Implementing the union's proposals would not produce the "win/win" scenario envisioned by PEB 250. It would instead tilt the balance heavily in favor of employees.

A. SMART-TD's Proposal for Self-Supporting Pools is Inferior to the Carrier's Proposal.

While the union's proposed implementation of Article VII(a) nominally provides for a new process to fill pool vacancies, Union Sub. at 86-87, it comes with several hidden traps and unnecessary limitations. First, the union's proposed language (its Article I.B.1) would prohibit pool employees from doing various kinds of work, and thereby force continued reliance on the extra boards.[22] *Id.* at 86.

Second, as with many other aspects of its proposal, SMART-TD tries to exploit Article VII as a means to obtain additional compensation. In particular, it proposes to retain the rule providing that if the pool and extra board are both exhausted, the carrier

[22] SMART-TD complains that Union Pacific's proposal to use pools to perform dog-catching or Hours of Service relief is not a question within the scope of Article VII. Union Sub. at 54-56. As discussed below, however, the type of work that self-supporting pools will perform is obviously a rule respecting the establishment of self-supporting pools, and thus is encompassed within "carrier-specific implementation matters" for Article VII. *See infra* at 43-44.

can turn to the "first out rested and available trainperson from a different pool at the same location" to fill the vacancy. Union Sub. at 86. However, the union would attach new strings to the exercise of that right – it proposes that, in addition to a make-whole payment (*i.e.*, a payment to make up any difference in pay the employee would have received had they worked their normal assignment), the employee would also be entitled to an additional 65-mile payment for each round trip. In addition, the union would force the carrier to add an extra board position if it exercises this right more than 4 times, and would require reliance on the alternate pools before going to alternate extra boards, both of which would further increase costs. *Id.*

Third, the union's proposed language (Art. I.B.2) says that unavailable employees will be removed from the pool, but, unlike the carrier's proposed language, fails to expressly provide for which employee will fill their slot. *Compare* Carrier Ex. 7 at 5. For all of these reasons, the carrier's Article VII(a) proposal will be more functional and efficient – as well as offsetting the cost of rest days – and so should be adopted.

B. SMART-TD's Pool Regulation Proposal Creates New Guaranteed Income for Pool Employees and Exceeds the Board's Jurisdiction.

The new pool regulation rules proposed by the Carrier – which include regulating pools based on starts; taking into account future rest days and other known absences; and periodic (and automatic) adjustments to the number of turns in the pool – are all meant to right-size pools so that the employee supply matches the need. This should decrease reliance on the extra board – positions that are inherently less stable for employees and more costly and less reliable for carriers.

Likewise, in addition to changing the way that pools are regulated, Article VII also authorizes carriers to "abolish or establish road, yard or combination extra boards" based on "the needs of service." These changes were intended to create more structure and stability for employees "in a mutually beneficial way that improves efficiency and does not increase carrier costs."[23]

However, SMART-TD's competing Article VII(b) regulation proposal goes far beyond what the carrier has proposed and seeks to impose new and additional costs. In particular, SMART-TD has proposed that "[s]hould a pool freight employee not obtain the target starts for their pool, due to no fault of their own, they will be compensated a trip rate for each start up to the mid-range target." *See* Union Sub. at 95 (union's proposed Art. V.I). In other words, pool employees, like their extra board counterparts, would be guaranteed a minimum income so long as they were available for work on days other than their rest days. This proposed rule – which could increase Union Pacific's costs and incentivize employees to sharpshoot their schedules in order to pad their income – was not the intent of Article VII.[24]

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[23] *See* Ex. 18 (July 11, 2022 Comprehensive Proposal from NCCC to Rail Labor Unions) at Attachment C.

[24] SMART-TD's pool regulation proposal is also inferior to Union Pacific's proposal in various other respects. For example, Union Pacific's pool regulation formula accounts for the addition of assigned days off and the corresponding decrease in employee availability; SMART-TD's proposal does not. Union Sub. at 93-94. The only way to achieve the targeted ranges proposed by SMART-TD while simultaneously adding rest days is to fill the rest day vacancies with the extra board. Regardless of the number of employees available in the pool, the same number of trains will run. As a result, decreasing the number of pool employees available would mean increasing the number of employees on the extra board, positions which have less stable schedules for employees and which impose greater costs on Union Pacific (primarily because of the guarantees). That is the opposite of the intent of Article VII, which, as PEB 250 noted, is supposed to generate "operational benefits and cost savings." Likewise, the union's proposal would also require a process to ensure that earnings do not decrease with the introduction of rest days. Union Sub. at 94-95. That is just another backdoor attempt to require pay for rest days.

C. SMART-TD's Standing Bid Proposal Does Not Adequately Address the Problems that Article VI Is Intended to Remedy.

Article VI of the Agreement – which authorizes implementation of an automated bid system – is meant to increase efficiency by awarding jobs in a standardized fashion and reducing the disruption that occurs when employees are displaced (or bumped) from a position by a more senior employee. Under the current rules, displacements occur thousands of times per year. The consequence, as Union Pacific has previously explained, is that a large number of otherwise active employees are unavailable at any given time, lingering in the interstices between jobs. Carrier Sub. at 17-18.

Union Pacific's Article VII proposal would alleviate those problems, and to a large extent SMART-TD agrees on the solution. However, SMART-TD's counter-proposal suffers from several flaws. First, SMART-TD's proposal would generate more displacements by allowing employees to displace those less junior to them at least once every 30 days. *See* Union Sub. at 106. Moreover, although SMART-TD's proposal requires displaced employees to exercise seniority "within twenty-four hours" after being "properly notified," it does not define what that means. As such, anyone who avoids Crew Management's phone calls could have more than 24 hours to go to a new position.[25] SMART-TD's proposal also grants employees up to 96 hours to report to certain positions (*see id.*), creating more unavailability.

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[25] Union Pacific's proposal, by contrast, requires displaced employees to exercise seniority "within twenty-four (24) hours of proper notification" but adds that "[i]n the event a trainperson cannot be immediately contacted, proper notification will be considered as having been accomplished eight (8) hours from the time CMS calls all contact numbers listed in the trainperson's personal file in the crew management system, one time each and leaving a message, if possible." *See* Ex. 7 at Art. VI.L.

Second, SMART-TD asserts that "[i]n association with seniority moves, the parties agreed to address the forcing of employees to outlying assignments or locations with temporary lodging." Union Sub. 41-42.[26] Not so. While Union Pacific may have been willing to do so as part of a voluntary agreement, it is not agreeable to doing so as part of an arbitrated agreement. SMART-TD's request for lodging, meal allowances, and transportation reimbursement for employees force-assigned to certain positions is just another demand for additional compensation. It is outside the scope of Article VI, and not something that can be imposed by the Board.

Finally, SMART-TD says Union Pacific is unable or unwilling to develop new software to automate these processes. Union Sub. at 41. The union proposes a 2-year deadline for the railroad to do so, and proposes delaying implementation of any aspect of either side's Article VI proposal until then. *See* Union Sub. at 102 (proposed Side Letter 1). This proposed delay is entirely unnecessary. Union Pacific can implement all aspects of its Article VI proposal (and, in fact, has already implemented similar procedures for the engineer craft). The software-based approach that the union demands would be very expensive and would, as practical matter, eliminate displacement time altogether. That will cause temporary furloughs for some junior employees, something that neither side wants. The railroad's Article VI proposal, by contrast, need not be delayed and can be adopted now.

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[26] The union also proposes a more restrictive rule for bulletining new position, requiring a new yard position when an extra job is run more than three consecutive days, even if not on the same shift. Union Sub. at 103. Current rules generally allow the carrier more flexibility to fil vacancies from the extra board.

D. SMART-TD's Extra Board Supplementation and Pay Proposal Exceeds the Board's Jurisdiction and Would Unjustly Diminish Union Pacific's Article VII Rights.

Article IV of SMART-TD's proposal (Union Sub. at 92-93), which the union characterizes as "Extra Board Supplementation and Pay," would dictate a new order for calling employees to fill vacancies when the extra board is exhausted; impose additional costs on Union Pacific for filling those vacancies; and dilute Union Pacific's expressly-granted Article VII right to "abolish or establish road, yard or combination extra boards." None of these changes should be imposed.

The union's proposal is based on the notion that Union Pacific must maintain existing distinctions between road and yard extra boards. However, the 2022 National Agreement expressly authorizes Union Pacific to "abolish or establish road, yard or combination extra boards . . . ." *See* Ex. 1 at Art. VII(b)(6). Union Pacific is therefore entitled to abolish a road and/or yard extra board, and replace it with a combination board from which employees could be called for either road or yard service. This operational flexibility is conditioned on at least one of (1) rest days; (2) the ability to trade turns; or (3) a pre-arranged lay-off procedure. Under Union Pacific's proposal, employees would receive all three. By mandating that employees in road service cannot be called for yard service or vice versa without additional payment,[27] SMART-TD's proposal would require Union Pacific to pay twice for the same efficiencies.

[27] This additional payment would come in the form of either overtime or payment "over and above" the guarantee, meaning that the earnings would not count against the minimum income that the employee is guaranteed to receive just by being available to work. The employee would essentially be getting paid twice for the same day of work.

Nor is it appropriate for this Board to address SMART-TD's gripe about the fact that, under existing rules, most penalty and arbitrary payments offset guarantees. *See* Union Sub. at 43. That complaint, as SMART-TD concedes, concerns the grievance process; it has nothing to do with pool staffing or regulation. *See id.* (arguing that eliminating penalty payments offsets "would preserve and strengthen the dispute resolution process").[28] The same is true of SMART-TD's request for an additional 65-mile payment when employees from one pool are called to fill a vacancy in another pool. *See* Union Sub. at 94 (proposed Article IV.B); *see also supra* at 22.

SMART-TD also seeks to dilute the benefits to which Union Pacific is entitled under the National Agreement. In particular, SMART-TD proposes conditioning Union Pacific's right to establish extra boards at certain locations on the Carrier providing 30 days' written notice of its intent to do so, and bargaining over "reasonable terms" for that board. However, SMART-TD does not stop there; the Union also seeks to prevent the Carrier from staffing any such newly-established boards "from an existing source of supply." These conditions and restrictions are entirely at odds with the 2022 National Agreement, which affords to Carriers the unconditional right to "establish road, yard or combination extra boards," and to then regulate those boards "based on the needs of service." That regulation, by Article VII's express terms, is done by the carrier, not by the union.

[28] Moreover, this is another issue on which the union has lost repeatedly in arbitration. *See, e.g.,* Ex. 49 (*SMART-TD v. Union Pacific*, NRAB First Div., Award No. 30787 (Dec. 10, 2021) (Espinosa, Arb.)). It is not appropriate to use interest arbitration on scheduling issues to try to undo years of arbitral awards on other subjects.

E. SMART-TD's Request for Additional Training Pay and Allowances Exceeds the Board's Jurisdiction.

SMART-TD proposes increasing the "certification allowance," which is an extra payment that employees receive each time they work. *See* SMART-TD App'x B at Art. XV. SMART-TD tries to justify this ask by linking it to pool regulation, saying that "both are based [on] starts." *See* Union Sub. at 43-44. But the same could be said of almost any form of compensation. The fact that pools will be regulated by starts rather than by mileage – something that has no effect on the amount of work being performed, but only how that work is distributed – does not justify a pay increase. Nor does this Board have jurisdiction to grant it.

The same is true of SMART-TD's request for additional training pay and allowances. SMART-TD attempts to justify them as a way to improve employee retention and as a matter of equity. Again, that has nothing to do with the "scheduling" issues contemplated by Articles V, VI, or VII.[29]

F. SMART-TD's Automatic Mark-Up Proposal Is Unnecessary.

Lastly, the Union proposes to preserve the "Automatic Mark-Up Interpretation" dated March 7, 2005. *See* Union Sub. at 45-46. However, Union Pacific's proposal (Ex. 7) does not call for any changes to that agreement, so this issue is moot.

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[29] All of these demands – increases to certification allowances, training allowances, and training pay – replicate proposals that SMART-TD raised (unsuccessfully) in addition to its scheduling proposals during the last round of bargaining. *See* Ex. 16 (Mar. 24, 2021 Bargaining Proposal from CBC to NCCC) at 42 (proposing to "increase certification allowance to $28 per start or tour of duty worked, subject to future wage increases"); *id.* at 51 (proposing to "compensate trainees at the same rate as the assignment on which they are training"); *id.* at 52 (proposing to pay a 4-hour allowance, in addition to earnings, to any "crew utilized by the carrier to provide training").

III. THE UNION'S COSTING METHODOLOGY IS INACCURATE OR ABSENT.

One idea on which the parties seem to agree is that any arbitrated agreement should be "fair and equitable." Union Sub. at 15; *see also* Carrier Sub. at 4. Moreover, both sides appear to agree that whether an agreement is "equitable" depends on how we measure the cost of the various elements of each proposal, and whether those costs and benefits are roughly equal. *See* Union Sub. at 15 (comparing cost of Article V to savings under Articles VI and VII); Carrier Sub. at 45-58 (detailing carrier's costing methodology) & Ex. 6 (Union Pacific's Costing Analysis).

That is, however, where the agreement ends. The parties are far apart in how they assess the relative costs and benefits of their proposals. And as we now show, SMART-TD's approach to costing is deeply flawed.

A. The Main Differences in the Parties' Approaches to Costing.

SMART-TD's costing analysis (Union Exhibit 43) is hard to square with the carrier's analysis (Ex. 6). The parties reach very different conclusions about both (a) headcount impact and (b) the dollar cost or savings of work/rest schedules and Article VII changes. A detailed review and analysis of the differences between the parties' approaches is attached as Exhibit 42. In sum, the variance in the parties' conclusions is driven by the following five factors:

(1) *Headcount*: The union's measure of current employee headcount is based on a snapshot from July 2024 (2633 pool employees and 1921 road extra board employees). The carrier's numbers, by contrast, use an average over twelve months,

ending May 31, 2024 (2534 pool employees and 1608 road extra board employees). Neither approach is necessarily better or worse, but the difference in approach results in a variance in the starting baseline that each side is using.

(2) *Assigned Service*: The union's headcount numbers include only thru-freight (road) employees in unassigned service. However, some of its Article V proposals – including its Appendix B work/rest schedules – would apply to all trainpersons, including employees in yard or other assigned service. Union Sub. at 88. As explained above, Union Pacific does not agree that employees in assigned service are covered by Article V. *See supra* at 8. Nevertheless, the carrier's calculations do, of course, include assigned service headcount when measuring the cost of any union proposals that would cover those employees. That adds almost 1,000 employees to the costing of certain items.

(3) *Benefit Cost*: Both sides account for benefit costs in assessing the impact of headcount changes, but use different numbers. Union Ex. 43 at 5, 18. The union's per-employee annual benefit cost number is $77,320.99. *Id.* Union Pacific's annual per-employee benefit number is $34,332.83. Ex. 6 at 5. The difference appears to be a function of how the parties are accounting for taxes, including (most notably) Railroad Retirement taxes.[30] In the attached analysis, the carrier uses the union's assumed benefit cost to show how the difference affects the calculations.[31]

[30] *See* Ex. 42 (Rebuttal Costing) (comparing calculation of fringe benefit costs). Union Pacific does not include Railroad Retirement because those are payroll taxes, and so, like wage costs, are a function of the amount of work performed, as opposed to a carrying cost that varies with headcount. *Id.* *See also infra* at 31.

[31] *Id.*

(4) *Earnings*: The parties' proposals under Articles V, VI, and VII change how work is assigned and distributed, *i.e.*, whether it is done by pool employees or extra board employees. They do not, however, alter the total amount of work (*i.e.* crew starts) that must be done. That will fluctuate regardless of which collectively-bargained rules apply. As a result, the amount that Union Pacific pays in earnings – meaning the amount it pays for the time that employees actually spend working – is not going to change as a result of this proceeding. The one exception to that is the guarantee. Because that is paid (almost entirely) to extra board employees, the changes under Articles V, VI, and VII will affect how much guarantee Union Pacific must pay.

SMART-TD's approach to costing does not seem to recognize that earnings (as distinguished from the guarantee) are not relevant. The union has included employee earnings in its calculation of both savings and costs. Union Ex. 43 at 5, 7, 12, 14. That dramatically inflates its estimates.

By contrast, Union Pacific's costing recognizes that implementation of its proposals will shift some employees from the extra boards to the pools, but will not decrease the overall amount of work, and hence will not decrease freight earnings for that work. That is why the railroad's calculation of potential savings focuses on (a) benefit carrying costs and (b) reduction in guarantee payments based on transfer of employees from the extra boards to the pools.[32]

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[32] In contrast to earnings, benefits are paid regardless of how much an employee works. Thus, it is appropriate to measure the cost of changes in headcount based on those carrying costs, *i.e.*, how much it costs to maintain each employee.

(5) *Availability Factor*: Introducing rest days will reduce employee availability vis-à-vis the status quo. The reduction in availability depends on the number of rest days in a period. For example, a 6/3 schedule means that an employee is unavailable three days out of every nine, or 33 percent of the time. Under a 5/1 schedule, an employee would be unavailable one day out of six, which is 16.6 percent. (This unavailability will be in addition to, of course, other unavailability due to vacation, sick days, personal leave, etc.). The parties seem to agree that the amount of additional unavailability is what determines how many employees the carrier will need to add to perform the same amount of work. Union Ex. 43 at 7.

However, the parties make different assumptions about employee use of rest days. Because Union Pacific has to be able to staff its trains, it must assume that employees will take their rest days, and increase headcount accordingly. If it did not do so, the railroad would end up holding trains for lack of crews (absent some fail-safe, such as the right to use any qualified employees to staff trains in certain exigent circumstances, as the railroad has proposed, *see* Exhibit 7 at 2).

SMART-TD, by contrast, assumes that employees will often not take their rest days, and so reduces its estimate of unavailability. Thus, for example, rather than using a 33 percent factor for a 6/3 schedule, the union uses 25 percent. Union Ex. 43 at 7. This has the effect of reducing the union's estimate of the number of extra employees that will be needed to support a new assigned days off rule, and thus reduces the estimated cost of imposing a new work/rest schedule.

B. The Union Overstates the Savings From Article VII.

Perhaps the most startling – and frankly preposterous – conclusion in the union's entire submission is its assertion that implementation of Article VII will save the carrier $333,587,000 on an annual basis. Union Sub. at 29. It asserts that "[t]hroughout the negotiation process Carrier officers repeatedly stated that self-supporting pools would allow [the railroad] to reduce guaranteed extra boards by 80 percent." *Id.* at 29. That would be a cut, the union says, of 1,536 jobs (plus additional jobs from the supplemental boards). Union Ex. 43, at 12, 15. SMART-TD then multiplies those numbers by its estimate of total average earnings and benefits paid to each employee to derive a projected savings of 1/3 of a billion dollars. *Id.*

That is not even remotely accurate. First, implementation of Article VII will not result in the elimination of 80 percent of extra board jobs, and the carrier never said it would. Viewed in the most charitable light, it appears that the union's bargaining representatives are misinterpreting a discussion during the parties' June 4 bargaining session in Las Vegas about using self-supporting pools to perform Hours of Service relief (sometimes called "dog-catching"). During that session, the carrier's representative said that under Union Pacific's proposal, employees in the pool would do about 80 percent ***of the Hours of Service relief work***. That is a tiny fraction of the overall work, and so does not by any stretch of imagination mean that the extra boards would be cut by 80 percent. In fact, as the carrier's own costing analysis shows, implementation of Article VII will reduce extra board employment by only 101 people (not more than 1,500). *See* Carrier Sub. at 33 & Ex. 6.

Second, most of the $333,000,000 "savings" in the union's calculation are employee earnings. *See* Union Ex. 43 at 12 (calculating a savings of $207,380,000 without considering benefits). As explained above, Article VII does not change the number of trains that are running or the number of crew starts. So any earnings that the railroad is not paying to the extra board will instead be paid to the pool employees who do the work. Hence, that is not a savings.

On a related note, the reduction of 101 extra board positions does not mean that any current employee will lose their job.[33] The employees assigned to any extra boards that are reduced – most of which are the so-called "supplemental" boards that perform very little work – can bid to other jobs. The benefit to the carrier is that (a) it will pay those employees for working rather than merely being available, and (b) it will not have to increase hiring as much as it otherwise would have if Article V were implemented alone (and even so will still need to hire about 250 more people).

C. The Union Understates the Cost of its Work/Rest Proposals.

SMART-TD provides costing for some (but not all) of its proposed work/rest options under Article V, including a 5/2, a 6/3 and an "EDO Model." Union Ex. 43 at 6; *compare* Union Sub. at 85-87 (listing other work/rest models, including a "preferred" 4/1 schedule, but providing no costing for that option). It concludes that its proposals would result in savings of $53 million (for EDO only) at the low end to a cost of $132 million per year (for 6/3) at the high end. *Id.* at 7.

[33] Likewise, the additional 78 heads saved from the implementation of self-supporting pools reflects more efficient operation of the pools, not job cuts.

Again, there are multiple overlapping errors in the union's costing. First, SMART-TD includes employee earnings in these estimates of the cost of work/rest, which for the reasons stated above is not appropriate. Its estimates are also inflated by its larger benefit cost estimates (including payroll taxes). The carrier's attached analysis strips out those inappropriate factors to show what the actual cost of the union's various work/rest options would be.[34]

Second, the union fails to include road extra board employees in its costing of its work/rest proposals, despite the fact that those proposals would apply to those employees. The upshot is that the union understates the cost of its proposals by as much as $37 million, assuming its Appendix B proposals are applied only to road service extra boards. If that proposal were applied to yard extra boards too, as the union has also provided in its Appendix B, it would add another $16 million.[35]

Third, SMART-TD understates the increase in unavailability for each option and thus, as discussed above, fails to account for the total number of additional employees that will be required to perform the work. For example, it assumes that a 6/3 schedule will require an additional 658 employees in pool service, when in fact the railroad would need to hire as many as 878 new employees in the pools (plus another 831 on the road and yard extra boards) to perform the same amount of work.[36]

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[34] *See* Ex. 42 (Rebuttal Costing). The carrier's rebuttal costing focuses on the union's proposed 6/3 and 5/2 models. Union Pacific cannot replicate the union's assumptions about the EDO model, and concludes that SMART-TD must be assuming some unrealistic level of availability under that model. The railroad sees no possible way that the addition of 12 more days of time off for trainpersons would generate improved availability.

[35] *Id.* (these numbers assume Union Pacific's fringe benefit calculation).

[36] *Id.*

D. The Union Provides No Costing For Its Other Demands.

In the carrier's Opening Submission, we explained that all of the "extras" in the union's various proposals – meaning the items that exceed the scope of Articles V, VI, and VII – would cost anywhere from $90 to $150 million per year, depending on which particular proposal we are costing. Carrier Sub. at 55-58 & Ex. 6. In the union's latest Appendix B proposal, it goes even further, adding even more pay and other extras that would, in sum, cost more than $200 million per year.

In contrast to its lengthy (albeit flawed) costing of work/rest schedules and self-supporting pools, SMART-TD never even mentions how much it would cost to impose all of the extras (including differentials, overtime rules, more personal leave, elimination of entry rates, and so on). The obvious explanation for that omission is that SMART-TD knows there is no way to justify its demands from a costing or equity perspective. As we have explained, providing any form of voluntary assigned rest days for thru-freight employees will be – by itself – very costly, totaling at least $18 million per year for a 5/1 schedule plus expanded Smart Rest. Carrier Sub. at 31-32. Other work/rest schedules would cost much more. It is difficult to craft any rules under Articles VI and VII that can generate equivalent savings for Union Pacific. Adding unrelated windfalls on top of rest days – *i.e.* differentials, overtime, meal allowances, paid days off, etc. – shifts the balancing act from difficult to impossible. This Board would have to make huge changes to employee compensation (such as reducing all existing guarantees) to begin to even things out. Articles V, VI, and VII do not provide that kind of license to rewrite other aspects of the parties' agreements, in either direction.

E. The Union Mischaracterizes the Industry's Cost/Benefit Estimates Before PEB 250.

In addition to its fanciful notion that Article VII will save Union Pacific more than $333,000,000 per year, SMART-TD also points to two particular comments that the National Carriers' Conference Committee made on behalf of the industry during the proceedings before PEB 250. The union says those comments support its demand for a sweeter deal, but it is wrong on both counts.

First, SMART-TD notes that the carriers – including Union Pacific – expressed a willingness to negotiate a "quid pro quo" in exchange for new scheduling and operational efficiencies. Union Sub. at 8, 65-66. And that is true – the carriers did say that. But they were clearly referring to rest days. The proposed trade was rest days for improved bidding and self-supporting pools/pool regulation, nothing more, nothing less.[37]

Second, SMART-TD emphasizes that the carriers estimated their savings at "approximately $38,000,000," thereby implying that Union Pacific should be required to provide at least that much in benefits. Union Sub. at 8, 65-66. However, any savings estimates were for the entire industry, not just one railroad. *Id.* at 8. Union Pacific was roughly 32 percent of the industry at that time, and so if the estimated savings were $38 million, then Union Pacific's share would have been about $12.2 million. The value of the quid pro quo the railroad is offering is at least $18 million. Carrier Sub. at 52. Thus, Union Pacific has kept the promise it made to PEB 250 (and then some).

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[37] Ex. 33 (Declaration of Brendan Branon) at 3-4; Ex. 32 (Carrier Submission to PEB 250) at 32-33; Ex. 50 (Transcript of Proceedings Before PEB 250) at 713; Ex. 51 (Sept. 30, 2022 Statement of SMART-TD President Jeremy Ferguson) at 4.

IV. THE UNION'S ATTACKS ON THE CARRIER'S PROPOSAL ARE MERITLESS.

In the second half of its submission, SMART-TD turns to its critique of what it anticipated the carrier's position would be. *See* Union Sub. at 47-63. As we now show, that critique is both moot and misguided.

A. The Carrier Has Adapted Its Proposal For This Arbitration.

As discussed above, both sides agree that this interest arbitration is a different exercise than the prior negotiations to reach a voluntary agreement. The parties are free to bargain over virtually anything, but once we get to arbitration, each side needs to reframe its proposals to fit within the comparatively narrow scope of Articles V, VI, and VII. *See* Union Sub. at 37.

SMART-TD seems to assume that Union Pacific has failed to do that. It assumes that the railroad is pursuing various ideas that do not fit easily within the bounds of the 2022 National Agreement. *Id.* at 46-48. In that regard, the union offers a list of 20 different "provisions proposed by Carrier that were not open to discussion under Articles V-VII of Public Law 117-216." *Id.* at 47.

The union's assumptions are wrong. Unlike SMART-TD – which has maintained an unrestrained wish list of unrelated items – Union Pacific revised its proposal for this proceeding in order to fit within the limits of Articles V, VI, and VII. As shown in the following table – which is responsive to the union's list on page 47 of its submission – the railroad has dropped many of its asks. Everything that remains is permitted under Articles V, VI, and/or VII:

Union's List of Anticipated Carrier Proposals	**Carrier Response**
1. *Combination of pool freight service boards and extra boards*	*Dropped*
2. Incorporating irregular service into pool freight service	Article VII(a) (b)
3. Sole right to regulate all boards	Article VII(b)
4. *Elimination of agreements providing for calling/starting windows, including yard protecting extra boards*	*Dropped*
5. Elimination of agreements providing for daily preference or daily mark-up in yard service	Article VI
6. *Elimination of applicable agreements providing for penalty payments when new work is given when working after a certain period of time*	*Dropped*
7. *Ability to establish assignments in road and/or yard service with variable start times and/or reporting points*	*Dropped*
8. *Elimination of any agreement requirements, if applicable, to conduct a yard study*	*Dropped*
9. Elimination of any existing agreement provisions providing an employee with the ability to extend rest, elect additional rest, take voluntary rest, or any other fatigue mitigation programs	Article V
10. *Elimination of trade turn provisions*	*Dropped*
11. Elimination of compensated days beginning when an employee is called to work (next stand for work)	Article V
12. Reduction in bulletin time for new assignments	Article VI
13. Reduction in bump time	Article VI
14. Elimination of temping vacancies	Article VII
15. Modification to the process for notifying employees they are displaced (reduced to one attempt)	Article VI
16. *Creation of a buffer board (AWTS – Part-time work board)*	*Dropped*
17. *Reduction to recall time for furloughed employees*	*Dropped*
18. Elimination of displacement time	Article VI
19. *Standardization of make whole payments*	*Dropped*
20. *Creation of a disputes committee to resolve issues with the agreement*	*Dropped*

B. The Voluntary Versus Mandatory Issue Is Moot.

One of the union's most prominent complaints about the carrier's bargaining position concerns the discussions over whether assigned days off should be mandatory or voluntary. *See* Union Sub. at 19, 21-24, 49-51. During negotiations, as SMART-TD notes, Union Pacific maintained that "assigned days off" should be mandatory, meaning that employees would be obligated to observe the schedule negotiated by the parties. *Id.* at 17. Because Article V calls for "voluntary" assigned days off for thru-freight, the union says, the Board cannot impose a mandatory schedule. *Id.* at 24.[38]

SMART-TD's focus on the word "voluntary" in the text of Article V is somewhat ironic, given that the union disregards other express terms in the very same sentence that limit application of days off to "thru freight road service." *See supra* at 8. But in any event, there is no need to resolve any debate over voluntary versus mandatory. Union Pacific's proposal includes a "voluntary" approach, both for pool freight and extra board employees. *See* Carrier Sub. at 40, 61 & Ex. 7. While the carrier would very much prefer a mandatory scheduling rule, here again it recognizes the need to conform its proposal to the bounds of the 2022 National Agreement for purposes of arbitration. It is unfortunate that SMART-TD has not done the same.

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[38] The union also asserts that"[b]ecause this Article was proposed by the Organization," it has some special authority to say what it means. Union Sub. at 22. It quotes the union's president, who says that the "intent of Article V" is to provide an opportunity to "voluntarily observe two (2) or more rest days within a rolling seven (7) day period." *Id.* However, it is not true that the union proposed the terms of Article V. It may have proposed the concept of assigned rest days, but the actual terms of Article V were the product of discussions between the carriers and the union coalition's chief spokesperson, who was the head of the BLET at that time. Moreover, there is absolutely no basis for President Ferguson's assertion that Article V must provide for 2 rest days in a 7 day period. Had the parties intended such a specific schedule, Article V would say that, but it doesn't.

That said, Union Pacific remains willing to discuss a mandatory work/rest schedule, which would indisputably be better for both sides. As explained above and in the carrier's Opening Submission, a voluntary approach makes it impossible for either side to gauge how many employees will, in fact, take their days off. Because the carrier must have enough employees to run the trains, it must err on the side of assuming that essentially all employees will take their rest days (or have a fail-safe allowing it to use any qualified employee to operate the trains). *See supra* at 32. That will inflate the size of the pools and the extra boards. As a consequence, if some employees do not take their rest days, there will be fewer work opportunities for each individual employee, thereby reducing their earnings. Moreover, if Union Pacific fully staffs the pools and boards and employees do not use their days off, it will result in furloughs. If employee behavior changes and they use more rest days, the railroad might need to hire more people. The end result is an accordion-like effect, as the workforce expands and contracts based on variations in employees' choices about using their days off.

C. Union Pacific Is Not Proposing the BLET Agreement.

Those concerns about workforce management are one of the reasons that the other operating craft union – BLET – agreed to a mandatory work/rest schedule in its own agreement under Articles V, VI, and VII. As SMART-TD explains, however, it has been and remains firmly opposed to adoption of anything comparable to the BLET agreement. Union Sub. at 48-49. Among other things, SMART-TD asserts that the BLET agreement was reached too quickly after PEB 250, and so could not possibly reflect "equitable" terms in line with the intent of the PEB or the National Agreement. *Id.*

Here again, there is a degree of irony in SMART-TD's argument. After dragging its feet for years, SMART-TD dismisses Union Pacific's success with another union as too prompt and efficient. However, any debate over the merits of the BLET agreement is moot, because neither side is proposing to adopt those terms.

D. Union Pacific Is Not Proposing a 11/4 Work/Rest Schedule.

Next, SMART-TD asserts that a "mandatory 11/4" schedule and/or a 6/2 schedule are not appropriate because they would run afoul of the union's view of "proper cycle time of pool turns." Union Sub. at 49-50. Most of the union's argument is moot, given that the schedules the union is discussing are not on the table. But it is worth emphasizing, once again, that nothing in Articles V, VI, or VII provides any basis for insisting on particular "cycle times." The Hours of Service Act sets the minimum period between shifts, and neither side proposed changing those rules in the bargaining that led to the 2022 National Agreement.

E. Union Pacific's Proposal Does Not Include "Financial Penalties."

The union's next objection is that under the railroad's putative proposal, employees "will face a substantial financial penalty if they take any non-compensated time off." Union Sub. at 51-52. Employees are not "machines," the union argues, and should not be "penalized" for time spent out of work. *Id.*

The union's over-the-top rhetoric obscures the fact that, here again, it is trying to undo long-standing principles linking "guarantee" payments to availability. *See supra* at 10. It defies logic to say that if an employee needs time off, they are being "penalized" unless they are paid for that time.

F. SMART-TD's Objections to "Combining Pool Freight and Extra Boards" Are Unfounded.

According to the union, Union Pacific did not gain the right in the 2022 National Agreement to "combine pool freight boards with extra boards" or "eliminate pool freight boards." Union Sub. at 53. Rather, it says, the railroad remains bound by existing agreements that reserve certain kinds of work to extra boards, including so-called "irregular service" like "dog-catching," short turn-around service, and other work aside from trips between rail terminals. *Id.* at 54-56.

That is nonsense. Article VII is crystal clear that the carrier may use pools instead of the extra boards to perform any necessary work. Indeed, that is the whole point of making a pool "self-supporting" – the employees in the pool can be required to do any work necessary for that pool, including dog-catching if the pool's trains are left outside the terminal. That conclusion is further reinforced by the language of Article VII(b)(6), which states that "[t]he carrier may ***abolish*** . . . road, yard or combination ***extra boards***."[39] If Union Pacific can abolish the extra boards, then the work those boards did must be done by other employees, *i.e.*, the employees in the pool, under the terms set forth in Article VII(a).

Under the union's contrary view, Article VII is a virtual nullity. Under its interpretation, even though Union Pacific can "abolish" the extra boards, it would still be required to perform various kinds of work with the extra boards, and so cannot, as a practical matter, abolish the extra boards after all.

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[39] Ex. 1 (2022 National Agreement) at 12 (emphasis added)

On a related note, the union also argues that the carrier's "proposal to combine pool freight boards with extra boards included eliminating the delineation between yard service and road service." Union Sub. at 57-58. It complains that doing so would violate long-standing jurisdictional boundaries between road and yard. *Id.*

It is not entirely clear what the union is referring to here. Union Pacific is not proposing to eliminate road/yard distinctions. However, it does have the express right under any implementation of Article VII to abolish or establish "road, yard, or combination extra boards," and therefore would be free to, for example, abolish an existing road extra board and replace it with a newly established "combination" board that supports both road and yard operations. Here again, the union appears to be trying to chip away at the benefits that Union Pacific gained in Article VII by taking an extremely crabbed view of Article VII's terms (while at the same time promoting an unsustainably expansive view of Article V).

G. Combining Extra Boards Is Not Prohibited.

The union's quest for imaginary and atextual limits in Article VII reaches new heights when it declares that the railroad is not allowed to "combin[e]" extra boards or supplemental boards, but rather may only "abolish" or "establish" such boards. Union Sub. at 57.

That is, at best, a semantic quibble. Even if the union was right that the railroad cannot technically "combine" boards, the railroad could still "abolish" two existing boards and then "establish" a new board that includes the characteristics of both of the former boards.

H. The Union Is Wrong About Pool and Extra Board Regulation.

SMART-TD also objects to what it calls the carrier's "desire to gain full control of board regulation." Union Sub. at 59. According to the union, Article VII allows for only a transition to start-based regulation of pools, but still requires mutual assent to any particular numbers. *Id.*

Again, that is not so. As the *CPKC* award explains, it is the carrier that is "empower[ed]" to serve a notice implementing the terms of Article VII.[40] The union can respond with its own proposed terms for implementation, but nothing in the terms of Article VII forbids the carrier from proposing unilateral control over matters such as pool regulation.

In any event, this is another area in which the union is boxing with a ghost. Union Pacific has proposed specific numbers for start-based regulation for non-guaranteed pools and does not propose a unilateral right to change those numbers.[41] The only areas in which Union Pacific has proposed carrier discretion to regulate are (1) guaranteed pools, which by definition are guaranteed their income regardless of the regulation, and (2) extra boards, where the plain language of Article VII(b)(6) already provides for the carrier's right to regulate "based on the needs of service."[42] And to the extent that the union suggests that the parties agreed on "start targets," Union Sub. at 59, those numbers were predicated on reaching a complete voluntary agreement that was never finalized.

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40 Ex. 3 (CPKC Award) (Oct. 14, 2024) at 11.
41 Ex. 7 (Union Pacific Proposed Agreement) at 5-6.
42 Ex. 1 (2022 National Agreement) at 12.

I. The Carrier's Proposal Satisfies Each Element of Article VII(c).

SMART-TD notes that Article VII(c) provides for "workforce predictability and flexibility." Union Sub. at 59-60. It accuses the carrier of refusing to include provisions to address those requirements, and says that it is instead trying to "eliminate any/all Agreement provisions providing for rest" or trading assignments. *Id.* at 60.

That is not true. Article VII(c) requires "one or more" of three additional rest options, and Union Pacific's proposal satisfies all three. It satisfied Article VII(c)(1)(a) by providing for assigned rest days and/or "Smart Rest." It satisfies Article VII(c)(1)(b) by providing for trading turns. And it satisfies Article VII(c)(1)(c) by increasing the percentage of pre-approved layoffs. To the extent the carrier proposes elimination of other rest provisions, it is because they would be duplicative of these new rules.

J. The Carrier Is Not Seeking "Work Rule Concessions."

The union lists various items from Union Pacific's original bargaining proposal that "had no correlation or connection to the implementation of Articles V-VII." Union Sub. at 60-61. Again, these are moot, because, unlike SMART-TD, Union Pacific narrowed its proposal for this proceeding.

The one item on the union's list that is still at issue is the elimination of daily preference boards. As previously explained, daily preference boards would be replaced with adoption of the carrier's proposal under Article VI, which creates a system-wide "permanent bid" rule. Carrier Sub. at 32. Implementation of that new rule necessarily entails resolution of whether and how it will supplant other bidding systems, and thus the carrier's proposal is well within the bounds of this proceeding.

K. The Carrier Is Not Seeking "Buffer Boards."

Any debate over Union Pacific's previous proposal to create "buffer boards," *see* Union Sub. at 61-62, is moot. Because the parties were unable to reach agreement, the carrier has withdrawn that proposal. The parties agree that it is not a topic within this Board's jurisdiction.

L. The Carrier Is Not Proposing a Dispute Resolution Mechanism.

Union Pacific has also withdrawn its proposal to create a special procedure for resolving disputes following the implementation of Articles V, VI, and VII. *See* Union Sub. at 62-63. The railroad does not agree that such a provision would be unavailable under an arbitrated implementation of Articles V, VI, and VII, but since neither side is asking for it, there is no need to resolve that issue.

V. THE UNION OFFERS NO VALID REASONS TO RELY ON OTHER CARRIERS' AGREEMENTS.

As predicted in the carrier's Opening Submission, SMART-TD suggests that the Board could or should look to implementing agreements reached by BNSF and Norfolk Southern as models for an agreement to be imposed on Union Pacific. *See* Union Sub. at 67-70; *see also* Carrier Sub. at 64-71 (outlining reasons why other carrier agreements are not apposite). The union cherry-picks various provisions from the other carriers' agreements, asserts that they reflect an "equitable quid pro quo," and bemoans the fact that Union Pacific was not willing to agree to the same (or actually more costly) terms. The union concludes that Union Pacific's refusal to accept the other carriers' terms reflects an attempt to gain a "competitive advantage." *Id.* at 70.

SMART-TD's professed concern for the "competitive balance" between Union Pacific and other railroads is not credible. SMART-TD does not seem to think it poses a problem for fair competition if Union Pacific's trainmen compensation is ***higher*** than the other roads. Also, SMART-TD wants to pick and choose among the different provisions in other carrier agreements that it prefers. For example, the union has selected weekend differentials from the Norfolk Southern agreement and bereavement leave from the BNSF agreement, adding both to its proposal. Union Sub. App. B. at 99, 97-98. None of that solves for a supposed "competitive advantage."

Moreover, both of the other carrier agreements that SMART-TD cites were reached through negotiations. *See* Carrier Sub. at 66-67. They are voluntary deals, which are not applicable here to the extent they contain terms that are not "necessary for the successful implementation of each Article." Union Sub. at 37. Indeed, the CPKC-SMART award is the only example of an arbitrated agreement on these issues, and it does not include any of the extras that SMART-TD seeks.[43]

Nor does the union account in any way for the differences between the carriers in terms of crew management philosophy, existing rules, employee culture, or the like. It also overlooks the fact that Articles V, VI, and VII were intentionally designed to allow for different outcomes at each carrier. Carrier Sub. at 64-65. Blindly adopting specific terms in the BNSF and/or Norfolk Southern agreements would run counter to that intent and deprive Union Pacific of its right to its own bespoke agreement.

[43] *See* Ex. 44 (*SMART-TD v. Canadian Pacific Kansas City Railway*, Arb. Award (Dec. 23, 2024) (Phillips, Arb.)).

VI. UNION PACIFIC'S REFUSAL TO ACCEPT SMART-TD'S UNREASONABLE DEMANDS IS NOT "BAD FAITH BARGAINING."

Unable to offer any rational defense of its bargaining position, SMART-TD falls back on its usual tactic of blaming the carrier for the parties' inability to reach a mutual agreement. Union Sub. at 70-72. The union notes that both sides are obligated to bargain in good faith, and accuses Union Pacific of failing to live up to that obligation in two respects. First, it says that "Carrier repeatedly changed out key members of its bargaining team" during negotiations. *Id.* at 70-71. The union says that this forced it to waste time re-explaining its positions. Second, the union complains about what it characterizes as the carrier's "abandonment of negotiations." *Id.*

We have already anticipated and addressed much of the union's argument on this issue. In short, Union Pacific emphatically denies that it is guilty of bad faith bargaining, and instead maintains that bargaining failed primarily due to the union's regressive proposals and insistence on pursuing extraneous demands.

With respect to the union's specific accusation that the carrier rotated its bargaining team to delay negotiations, that is not true. The same key members of the carrier's team – including the Vice President of Labor Relations and the General Director with responsibility for the operating crafts – participated in every bargaining session and had full authority to reach an agreement. The only people who did not attend every session were specific subject-matter experts from Union Pacific's operating department, who the carrier brought in to try to explain to the union why its proposals were unworkable and contrary to the interests of its own members.

Likewise, SMART-TD's so-called "truthful facts" about the end of negotiations omit various critical details, including the fact that on June 4 in Las Vegas, the union announced that the parties were at impasse, and then failed to show up for the next day of negotiations. Given that, it was entirely reasonable for Union Pacific to conclude that the parties were not going ahead with their next scheduled bargaining session in Dallas. *See* Carrier Sub. at 30.

It is also worth emphasizing that saying "no" is not bad faith bargaining.[44] SMART-TD took an extremely aggressive stance in negotiations, which it was entitled to do. But Union Pacific was not obligated to accede to the union's demands. Nor was it obligated to come to a "middle-ground" so long as the union's proposals remained wildly excessive. In other words, the union was free to try its "anchor bias" strategy noted above, but Union Pacific was not required to fall for it.

As SMART-TD admits, Union Pacific was able to reach a comprehensive agreement with BLET on these same issues in a matter of weeks. Union Sub. at 48-49. Perhaps the reason that the same carrier negotiating team was not able to do so with SMART-TD has more to do with the union's position than any supposed "bad faith" on the part of Union Pacific.

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[44] *See, e.g. Independent Federation of Flight Attendants v. Trans World Airlines*, 878 F.2d 254 (8th Cir. 1989) (applying standards for bad faith bargaining under Section 2 First of the Railway Labor Act and holding that a consistent refusal to agree to the other side's demands is not illegal); *Independent Union of Flight Attendants v. Pan Am World Airways*, 624 F. Supp. 64, 66 n.1 (E.D.N.Y. 1985) (same); *REA Express v. B'hd of Ry. Clerks,* 358 F. Supp. 760, 771-72 (S.D.N.Y. 1973) (same).

VII. THE IGN AND T&P PROPERTIES ARE NOT EXEMPT FROM THE NATIONAL AGREEMENT.

The union's final argument is that two of its current collective bargaining agreements are exempt from any changes under Article VII of the 2022 National Agreement. Union Sub. at 77-83. SMART-TD notes that the two agreements in question – which apply on the former IGN and T&P properties, former railroads that are now part of Union Pacific – have provisions that limit changes except by "mutual consent." *Id.* at 77. The union further notes that an arbitration award by John LaRocco confirmed that those agreements required "mutual consent" for any changes. *Id.* at 79. Based on that, the union says, nothing in Article VII can apply to those properties. *Id.*

Again, we have already addressed this issue. Carrier Sub. at 72-74. As explained in the carrier's Opening Submission, the union's argument that the IGN and T&P agreements can be modified only by "mutual consent" begs the question. The issue is not whether the IGN and T&P agreements can be changed other than by mutual consent. Rather, the issue is whether the 2022 National Agreement ***is*** "mutual consent" to make any necessary changes to implement Articles V, VI, and VII.

On that point, the union has no plausible argument. The 2022 National Agreement was reached by the parties and provides for a process to change existing agreements. It contains no carve-out or exception for the IGN or T&P properties.[45] Hence, the parties have indeed mutually consented to implement the necessary changes, either by agreement or through arbitration.

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[45] Ex. 1 (2022 National Agreement) at Side Letter No. 5.

The union offers three indirect responses, none of which hold water. First, it points to language in Section 6 of the September 5, 1996 crew consist agreement, which says that its "moratorium provisions . . . will not be altered in any forum including but not limited to National Negotiations and Boards established pertaining thereto." Union Sub. at 77-78 and Union Exs. 68 & 69. The union seems to be saying that while there can be "mutual consent" to change the agreements, the parties cannot provide such consent in a national agreement. However, even if we assume that parties could agree to never change their existing contracts – and thereby defeat a subsequent agreement to do just that – the Section 6 language in question only bars subsequent national agreements to change "the moratorium provisions" of the IGN and T&P agreements. It does not bar subsequent national agreements to change the substance of the rules in those existing contracts, which is what the parties did in 2022.

Second, the union points to the LaRocco award, saying that "Carrier's attempt to impose arbitration . . . disregards this binding precedent." Union Sub. at 81. But the LaRocco award did not say anything about whether a subsequent agreement to make changes is or is not "mutual consent." Rather, that award concerned whether the union was obligated to bargain over a proposed change. When the union has agreed to bargain and in fact reached an agreement – which is what happened here – it cannot rely on the LaRocco award to claim that it is not bound by its own agreement.

Finally, the union asserts that Union Pacific is trying to "impose arbitration unilaterally." *Id.* at 82. Not so. SMART-TD ***agreed*** to arbitration when it entered into the 2022 National Agreement.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in its Opening Submission, Union Pacific respectfully requests that the Board adopt the carrier's proposed agreement.

Respectfully submitted,

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